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April 15, 1999

Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Salas:

RE: MM Dockets 98-204 and 96-16
(Broadcast and Cable EEO)

Transmitted herewith are the original and nine copies of the Reply Comments of MMTC et al. ("EEO Supporters") in this proceeding.

Under separate cover, we are transmitting ten copies of the University of Michigan's report "The Compelling Need for Diversity in Higher Education" (January, 1999), to be associated with these Reply Comments.

Respectfully submitted,

David Earl Honig
Counsel for EEO Supporters

Enclosures

cc: Judy Boley
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/dh

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Review of the Commission's	)	
Broadcast and Cable Equal	)	MM Docket No. 98-204
Employment Opportunity Rules and	)	
Policies	)	
and	)	
Termination of the EEO	)	MM Docket No. 96-16
Streamlining Proceeding	)	

TO THE COMMISSION

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REPLY COMMENTS OF EEO SUPPORTERS

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and Education Fund, Inc.
Minority Business Enterprise Legal
Defense and Education Fund
National Asian American
Telecommunications Association

[list of commenters continued]

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List A B C D E

[cover page, continued]

National Asian Pacific American Legal Consortium
National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals
National Association for the Advancement of Colored People
National Association of Black Journalists
National Bar Association
National Council of La Raza
National Hispanic Media Coalition, including its Los Angeles, New York, Chicago, Tucson, Albuquerque, Phoenix and San Antonio Chapters
National Latino Telecommunications Taskforce
National Urban League
People for the American Way
Project on Media Ownership
Puerto Rican Legal Defense and Education Fund
Rainbow/PUSH Coalition
Telecommunications Advocacy Project
Telecommunications Research and Action Center
Women's Institute for Freedom of the Press

April 15, 1999

REPLY COMMENTS

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Foreword

What distinguishes one child from another is not ability but access: access to education, access to opportunity, access to love.

-- Lauryn Hill (1999)

Summary

Opponents of restoring some measure of EEO regulation (generically herein, "EEO opponents") stand neither on legal nor moral high ground. Expanding recruitment so that minorities and women hear of each job vacancy deprives Whites and men of no rights to which they are entitled. Blastfaxing and e-mail reduce the marginal cost of expanded recruitment to zero.

As shown in comments being filed by the Lawyers Committee for Civil Rights, the goal of preventing discrimination is a complete and sufficient reason for the proposed regulations. The regulations are also well justified to promote diversity, to remedy past discrimination and to promote minority ownership.

Some EEO opponents advanced elaborate "voluntary" EEO plans. If these plans seem too good to be true, it's because they are: all of these plans are utterly unenforceable. Most broadcasters have not supported the industry's own voluntary EEO initiatives, even when the EEO Rule was in force. Moreover, any "voluntary" plan is doomed because, as history teaches, discriminators never "voluntarily" stop discriminating.

The cable industry's comments were supportive, helpful and gracious. One commenter, Ameritech New Media, suggests that the Commission allow EEO records to be maintained electronically. We agree. If the Commission adopted this simple constructive step, recordkeeping costs would drop virtually to zero.

Today's EEO opponents will someday look back on this proceeding and wonder why they cut down so many trees to fight the NPRM's modest, fair and morally decent proposals.

* * * * *

I. The Cable Industry And Leading Broadcasters Provided Constructive Input; Broadcast Trade Groups Did Not

The Commission should derive strength from the unanimous and unqualified support its proposal has enjoyed from every civil rights organization, every minority organization, every women's organization and every minority and women's broadcasting organization, as well as many other organizations with widespread experience in broadcast employment, including AFTRA.

The mainstream religious denominations universally and unequivocally supported the Commission's proposals. They represent the vast majority of American citizens.

Without exception, the cable industry generally supported the Commission's proposals.[1/] The NCTA and many individual cable operators filed constructive comments. The nation's largest cable company, Time Warner, unequivocally supported all of the Commission's proposals. Not one cable entity opposed the heart of the FCC's proposal -- recruitment-based EEO review with regulatory consequences. Some cable companies disagreed on some points of methodology, but these disagreements were taken in good faith and are subject to reasonable debate.

While many major cable companies filed comments, no major broadcaster found it necessary to spend time and money opposing the proposals in the NPRM, 13 FCC Rcd 23004 (1998). Instead, the major broadcasters participated through the voices of several of their

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1/ See, e.g., Comments of Telecommunications, Inc. at 3 ("TCI believes that the Commission's EEO rules can be shaped to accomplish the Congressional goals and objectives for equal employment practices while allowing cable entities some degree of flexibility in operating their businesses.")

CEOs as witnesses for the EEO Supporters.[2/]

Far too many of the EEO opponents' proposals were too extreme to merit rebuttal.[3/] But we cannot help wondering how so many EEO opponents could so piously assert that just recruiting minorities and women would unduly "pressure" broadcasters to hire minorities and women (see infra at 4-8). Just three years ago, these very same commenters advocated a potentially far more intrusive approach -- that the FCC ought to dispense relief and impose sanctions based on how many minorities and women a broadcaster hired![4/] This

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2/ See, e.g. Comments of EEO Supporters, Vol. III (testimony of Alfredo Alonso (Mega Broadcasting), Thomas Castro (El Dorado Communications), W. Don Cornwell (Granite Broadcasting), Willie Davis (All Pro Broadcasting), Cathy Hughes (Radio One), Chesley Maddox-Dorsey (Access.1 Communications), Russell Perry (Perry Broadcasting) and Jeffrey Smulyan (Emmis Broadcasting).

3/ For example, some broadcasters have proposed to exempt all but the largest stations, even though most broadcast employees depend on small stations as the route to a broadcast career. See, e.g., Comments of Smithwick & Belendiuk at 20 (proposing cutoff of 15 employees); Comments of Virginia Broadcasters Association ("VAB") at 14 (proposing cutoff of 25 employees). Ironically, other EEO opponents want even the largest stations to get special treatment. See Comments of State Broadcast Associations ("SAB") at 32 ("[i]n ensuring that licensees do not discriminate, the FCC should recognize that the larger the licensee company or institution, the more employees and the greater the opportunity for personality clashes and misunderstandings that may lead to complaints of discrimination.")

4/ See, e.g., EEO Streamlining Comments of Haley, Bader & Potts at 27 ("[i]f a broadcaster's employment profile bears a reasonable relationship to the relevant minority population, the broadcaster should be presumed to have a made a 'good faith' effort"); EEO Streamlining Comments of NAB at 13-14 ("[t]he Commission should give substantial deference to a broadcaster whose employment profile approaches parity with its labor force...if a station is at 90 percent of parity or higher in a given year, the station can show compliance by following its written program for all but 'emergency' hires." This was part of the NAB's elaborate plan (13-17) tying the achievement of specific levels of percentage of parity to the level of EEO compliance activities a broadcaster would have to engage in, and the level of enforcement which would result.) See also EEO Streamlining Comments of SAB at 10

[n. 4 continued on p. 3]

proves that many EEO opponents' professed concern for the constitutional rights of White males is situational rather than philosophical. Indeed, conspicuously absent from any EEO opponents' comments is even a single example of anti-White or anti-male discrimination in thirty years. They have propounded a cause of action in search of nonexistent real life victims.

Even more troubling is that for all their outrage about potential reverse discrimination,5/ no EEO opponent urged stronger EEO enforcement against the many anti-minority, anti-woman discriminators in the industry's midst.

It is unfortunate that so many EEO opponents want the FCC to eviscerate EEO enforcement just at the moment in history when the broadcasting industry has full equal opportunity within its grasp. Instead, the Commission should stay the course and accelerate EEO enforcement, with the goal of eliminating discrimination entirely. Only when regulation is no longer needed to prevent discrimination should regulation be abandoned.

II. The NPRM's Proposals Are Constitutionally Sound

Some EEO opponents suggest that it will be impossible to create new regulations from the ashes of Lutheran Church v.

4/ [continued from p. 2]

("[s]tations meeting the processing guidelines should be found in presumptive compliance with the EEO Rule...it is totally inappropriate to require stations that have achieved the goals of the EEO Rule -- hiring minorities and women in substantial numbers -- to be burdened with the administrative costs of ['paperwork'] in order to avoid sanctions.")

5/ The only EEO opponent whose 1999 comments were consistent with its 1996 comments was Smithwick and Belendiuk. We disagree with their comments but we respect their consistency.

FCC.[6] As shown infra, they are wrong.

The EEO Supporters endorse and subscribe to the Reply Comments of the Lawyers Committee for Civil Rights ("LCCR"). LCCR shows that the goal of preventing discrimination is a complete and sufficient jurisdictional basis for the proposed regulations. Other justifications also provide a basis for regulation, including promoting diversity, remedying past discrimination, and promoting minority ownership. The Commission should find that each of these justifications is complete and sufficient.

A. A broadcaster's hiring decisions, if nondiscriminatory, will have no effect on how the FCC treats the broadcaster

Some commenters suggest that the mere collection of race and gender data about applicants and interviewees will pressure broadcasters to hire minorities and women.[7] Historians know otherwise. The government collected race and gender data in each census since 1790 without thereby feeling "pressured" to provide minorities or women special or remedial treatment.

The procedures set out in the NPRM make it impossible for the Commission to consider whether a broadcaster hired or did not hire minorities or women when it evaluates the sufficiency of

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6/ 141 F.3d 344, rehearing denied, 154 F.3d 487 (D.C. Cir. 1998) ("Lutheran Church"). See, e.g., Comments of Delta Radio at 3 ("[t]he task of carving away the objectionable pieces of a rule which has been struck down as unconstitutional is 'often impossible' without 'so distorting the rule's formulation that it is no longer serviceable'" (citations omitted).)

7/ See, e.g., Comments of Evening Post Publishing at 14 ("requiring stations to collect race and gender information from applicants encourages stations to compare their numbers with local labor force statistics as part of the self assessment process"); Comments of NAB at 16 ("the collection and reporting of the race and gender of current employees will indirectly impose an incentive to hire minorities and females and possibly subject stations to unwarranted allegations of discrimination.")

recruitment and interviewing efforts.[8] Thus, there is no possible regulatory benefit or detriment available to a broadcaster by hiring or not hiring minorities or women.[9]

Furthermore, all five commissioners have indicated that they would not use Form 395 data to evaluate recruitment and interviewing. They must be taken at their word. Fears that an agency will not obey its own rules is not a valid reason not to impose the rules.[10] Indeed, as a practical matter, the Commission could not meaningfully evaluate hiring based on Form 395 data even if it wanted to do so.[11]

8/ The FCC is not barred from considering data on the employment of minorities and women if it is faced with an allegation that a station discriminated against minorities and women. No commenter argues that this 35-year old principle should be overturned, or that an exception should be made for broadcasters.

9/ Compare Lutheran Church, 141 F.3d at 353 (suggesting that broadcasters' knowledge that FCC will evaluate their statistical hiring profiles at renewal time might "pressure" them to hire minorities).

10/ The incentives for an agency to obey its own rules are very, very strong, and the penalties for agency noncompliance with its own rules are very severe. It is a "well settled rule that an agency's failure to follow its own regulations is fatal to the deviant action." Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1082 (D.C. Cir. 1974). See also Vitarelli v. Seaton, 359 U.S. 535, 539 (1959), Service v. Dulles, 354 U.S. 363, 379 (1957) and Gardner v. FCC, 530 F.2d 1086, 1091 (D.C. Cir. 1976).

11/ Two congressmen suggest that "[i]f the FCC has data on who applied for positions and who is currently employed, then it will have a fair idea who was hired." Letter of Hon. Michael G. Oxley and Hon. Ralph M. Hall, March 23, 1999, at 1. Respectfully, their letter reflects a misunderstanding of broadcast employment. Broadcasters typically have several vacancies per year; many have dozens of vacancies. Radio stations typically turn over half their staffs in a year. The same position may be filled several times during a year. Form 395 is an annual snapshot. Form 395 data might rescue a broadcaster from an allegation that it discriminates in hiring, and several years of zero minority employment on Form 395 (if combined with other evidence) might be an indication that it discriminated in hiring. However, the high rate of turnover in the industry makes it impossible to use Form 395 data to show that a broadcaster did not recruit adequately.

Some commenters have suggested that the NPRM's proposal will result in the substitution of White male recruitees with minority and female recruitees.[12] Actually, the Commission seeks only to expand the scope of recruitment and interviewing without diminishing anyone's chances to be recruited or interviewed. One commenter even suggests that it is impossible to notify more minorities and women of job openings without notifying fewer Whites and men of these openings.[13] The marginal cost of adding addresses to an e-mail or blastfax list is virtually zero. As sophisticated communicators, broadcasters are quite capable of devising cost-effective methods of communicating periodically with their own constituents.

B. Adarand does not disallow awareness of race in recruitment and interviewing

Some EEO opponents have mischaracterized a key holding in Adarand: that "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[14]

12/ See, e.g., Comments of Institute for Justice ("IFJ") at 4 ("a potential employee can be interviewed or not interviewed on account of race. He or she can be allowed to apply or prevented from applying for a job on the basis of race. And he or she can be recruited or not recruited for a position on account of race"); Comments of Evening Post Publishing, at 16 (the NPRM's proposal would "require broadcasters to keep an eye on race at all times during the hiring process.")

13/ Comments of IFJ at 4 ("[g]iven the economic reality that all corporations have finite advertising budgets, a requirement that broadcasters use a specified number of minority recruiting sources will inevitably mean that in some instances, a broadcaster will run an advertisement in a non-minority publication because of the Commission's quota. The tradeoff is inescapable.")

14/ Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 229-30 (1995) ("Adarand").

When a broadcaster changes its recruitment practices so that it notifies more minorities of job openings, in addition to nonminorities it was already notifying, the nonminorities have not been "treat[ed] unequally" because of their race. They would have been notified of the job openings under either the former or latter recruitment system. The Commission hardly proposes to ask broadcasters to notify minorities of jobs instead of notifying nonminorities. That is why the courts agree that recruitment programs are race-neutral.15/

Technically, an outreach program involves some minimal level of awareness of race. For example, a decision to send job notices to both American University and Howard University, rather than just to American University, involves awareness that Howard's student body is predominately Black. However, in Shuford v. Alabama State Board of Education,16/ Judge Thompson quite properly viewed this as a semantic distinction lacking any impact on equal protection analysis: "[a]lthough labeling recruitment of women and minorities neutral with respect to sex and race is somewhat misleading, the important point is that inclusive recruitment is readily justifiable. Seibels and Peightal appear to be using the concept of race and sex neutrality as a substitute for neutrality with respect to selection with its implications of inclusion."17/

15/ See, e.g., Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1557-58 (11th Cir. 1994) ("Peightal") and Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1571 ("Seibels"). See generally Comments of EEO Supporters at 55-86.

16/ 897 F.Supp. 1535 (M.D. Ala. 1995) ("Shuford").

17/ Id. at 1553-1554.

A claim under Adarand requires a cognizable industry. The only sense in which a nonminority facing minority applicants in his applicant or interview pool is "treated differently" is that instead of competing in an environment where minorities do not learn of job vacancies, he is now competing in an environment where everyone learns of these vacancies. A person is not "treated differently" under the 5th Amendment by being deprived of exclusive, potentially discriminatory advantages he had no right to receive in the first place.

Thus, the NPRM's proposals are consistent with Adarand and do not offend equal protection principles.

C. The NPRM's Second Generation proposals are not intended to be race-sensitive

Assisting minorities and women to reach their full potential in broadcasting will be the focus of the second generation of EEO enforcement. Appropriately, the NPRM contains several constructive proposals aimed at preventing discrimination against minorities and women after they become employed.

Like the recruitment aspects of the proposed regulations, the Second Generation proposals in the NPRM are evidently intended to be race-neutral. The NPRM's proposed 47 CFR §73.2080(c) specifies that broadcasters should analyze their

> efforts to recruit, hire and promote without discrimination on the basis of race, ethnic origin, color, religion, and gender...includ[ing] measures taken to...(vi) Offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility; (vii) Where union agreements exist, cooperate with the union or unions in the development of programs to assure qualified minority persons or women of equal opportunity for employment...and (viii) Avoid the use of selection techniques or tests that have the effect of discriminating against qualified minority groups or women.

See also proposed 47 CFR §76.75(f). These provisions are not expressly disallowed by Lutheran Church, as they do not require comparisons with the area workforce. However, they fit into a gray area in the law, since some could read them as governing the process under which broadcasters confer employment opportunities rather than the process under which they cast a wide net for mere notice and consideration for these opportunities. It appears, moreover, that the preliminary clause (which specifies no race or either gender) conflicts with the specific subsequent clauses (which specify minorities and women).

It is unlikely that broadcasters would, e.g., deny promotions to Whites or males on account of race or gender. However, out of an abundance of caution, these provisions could be reworded to substitute for "minorities and women" the words "members of any race or either gender."

III. EEO Enforcement Is Justified On Several Grounds

A. EEO opponents have failed to show that minority and female inclusion on a broadcast station staff does not promote program diversity

Some EEO opponents argue that the rules are unconstitutional because their is no nexus between an integrated staff and program diversity. These arguments ignore all evidence to the contrary, and in some cases is based on flat-earth, intellectually dishonest pseudoscience. EEO opponents make four principal arguments against the diversity rationale for EEO regulation.[18/]

18/ One argument can be disposed of at the outset: that "[t]he need for regulation rests on the unsupported and untested premise that programming in American media lacks diversity in some measure." Comments of Haley, Bader & Potts at 11; see also Comments of Delta Radio at 10-11. These commenters' concept of

[n. 18 continued on p. 10]

1. The alleged lack of impact of employee interactions on program content. Some EEO opponents maintain that minority and female employment at a broadcast station has no influence on program content.19/ The only evidence offered, however, was a survey by a law firm of its virtually all-White clients. Not surprisingly, these individuals lacked the skills and experience to detect how their interactions with minorities and women would have affected their thinking, and thus their program decisions.20/

18/ [continued from p. 9]

diversity presumes that there is such a thing as "enough" different thoughts transmitted to the public. Actually, there can never be too many views presented. See Multiple Ownership of Broadcast Stations, 22 FCC2d 306, 311 (1970) ("[w]e are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be that the 51st licensee...would become the communication channel for a solution to a severe local social crisis. No one can say that the present licensees are broadcasting everything worthwhile that can be communicated.")

19/ See, e.g., Comments of NAB at 19 ("[w]hile this broad [public interest] mandate has been interpreted to include the governmental interest in the promotion of programming diversity... the Commission, again, rests its authority on a conclusion that is unproven -- that diversity in programming will result from employment of minorities and women.")

20/ See Comments of Haley Bader & Potts at 20. This is reminiscent of the writing of scholars in Venice who insisted that the earth was flat even after Magellan had circumnavigated it.

The Commission expects some rigor from scientific studies. As Commissioner Kenneth Cox wrote over a generation ago:

> I do not think that either [one applicant's] programming survey or [the other applicant's] survey was well designed or properly executed, and each then submitted conclusionary reports based on interpretations which can be charitably described only as giving their respective private positions the benefit of every doubt. This is not the way to

[n. 20 continued on p. 11]

It is axiomatic that people learn from their interactions with one another and act on what they've learned. Evidence for this proposition in the broadcast context is overwhelming.21/

The proposition has been documented even more extensively in the academic context. Today, the EEO Supporters are filing with the Commission the University of Michigan's report "The Compelling Need for Diversity in Higher Education" (January, 1999). The report contains the testimony of nine distinguished experts who demonstrate that "students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."22/

20/ [continued from p. 10]

> furnish information to a regulatory agency which must make important decisions on the basis of the data supplied....One making a material representation to the Commission should have taken reasonable steps to be sure that the statements made can be sustained if challenged.

Television Broadcasters, Inc. (KBMT, Beaumont, Texas), 1 FCC2d 970, 976 (1965) (Concurring Statement of Commissioner Kennety A. Cox).

21/ See generally Comments of EEO Supporters at 134-166.

22/ Id. at 1 (Introduction). See Declaration of Patricia Gurin, Professor of Psychology and Interim Dean of the College of Literature, Science, and the Arts at the University of Michigan, id. at 99-234 (documenting how students educated in diverse classrooms learn to think in deeper and more complex ways, and are better prepared to become active participants in a pluralistic, democratic society); Declaration of William Bowen, President of the Mellon Foundation and former President of Princeton University, id. at 235-242, and Declaration of Derek Bok, Professor at the John F. Kennedy School of Government and former President of Harvard University, id. at 253-264 (documenting how minorities admitted to the nation's most selective schools have made significant achievements, both in school and afterward, and have contributed

[n. 22 continued on p. 12]

Broadcast diversity is a close cousin to academic diversity. The interactions, personal growth and decisionmaking sophistication which evolves in a broadcast program, news, or public affairs department occur in much the same way as the interactions, personal growth and decisionmaking sophistication which evolves in a classroom. Thus, we invite the Commission to take official notice of the overwhelming evidence that interracial interactions in a learning environment have profound effects on one's thinking and decisionmaking ability.

2. The alleged inability of entry-level employees to influence program content. Some EEO opponents argue that even if decisionmaking minority and female employees affect program content, entry-level employees do not.[23/] One commenter even speculated that entry-level employees do not advance into decisionmaking positions.[24/] However, as we have demonstrated,

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22/ [continued from p. 11]

in important ways to the education of those around them); Declaration of Kent Syverud, Dean of Vanderbilt Law School, id. at 265-268 (showing how a diverse law school class provides a more vibrant and lively opportunity for learning than could otherwise be achieved); Declaration of Robert Webster, a former judge in Oakland County and former President of the Michigan State Bar, id. at 269-272 (describing diversity's importance to the practice of law).

23/ See, e.g., Comments of Haley, Bader & Potts at 21 ("[t]he proposed EEO rule applies to all employees of a licensee, even though it is established that only a small percentage have any connection to programming.")

24/ Id. ("[t]he proposed rule rests upon an assumption, not supported by the facts, namely that all broadcast employees are on a lifetime broadcast career track, from entry level through programming and management ranks to ownership.") This is obviously wrong. Not all broadcast employees have to be on a career track for a regulation to be applied to them. Certainly many or most broadcast employees make their careers in the industry. Few schools and universities would ask students to devote four years of their lives learning the broadcast trade with the expectation that they will abandon it and start all over later.

entry-level positions are often the first step toward decisionmaking positions.[25] Furthermore, entry-level employees interact with decisionmaking persons, who learn from these interactions.[26]

3. The alleged inability of broadcast programming to affect society. Some EEO opponents contend that broadcasting is no longer in the viewpoint-dissemination business, so the public would be unlikely to benefit much even if diverse staffs yield diverse programming.[27] This argument has cosmetic appeal; unfortunately, too many broadcasters do indeed choose to broadcast little other than entertainment programming. However, all broadcasters, whether required to do so or not, broadcast some programs that address local problems, needs and interests. Furthermore, broadcast programming addressing community issues is quite effective and often of very high quality. Broadcasting is unsurpassed in its influence on the public's awareness of current events, politics, social issues and culture. The fact that most airtime is not devoted to community needs does not undermine the need for regulations affecting the airtime that does address those needs.[28]

25/ See Comments of EEO Supporters, Vol. IV, at 12-14 (summarizing expert witness testimony).

26/ Id. at 9-11.

27/ See Comments of Haley, Bader & Potts at 22 ("[e]xcept at the relatively small number of radio stations that broadcast a local news and talk format, nearly all of the [program time available to a broadcast station or cable system] is consumed by recorded music or network and syndicated programming.")

28/ Similarly, the fact that most of one's time during the day is not spent eating is no reason not to require USDA inspection of food, and the fact that most of one's day is not spent commuting is no reason to abandon federal automobile safety standards.

4. The alleged lack of impact on viewpoints of the experiences flowing from one's status as a minority or woman. Some EEO opponents suggest that the concept of program diversity rests on stereotyping of minorities and women. They maintain that minorities and women must be presumed to possess the same views and interests as Whites and men.29/

It is stereotyping to assume that an individual holds certain views because of her race or gender, just as it would be stereotyping to assume that because of her race, a person has limited ability, e.g., to work in a format sometimes associated

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29/ See Comments of SAB at 13-14 ("[a]ny attempt by the Commission to justify new affirmative action rules on the basis of their alleged link to 'diverse programming' would... necessarily rest on the claim that people's race or ethnicity determines how they think or act and would thus rest on the constitutionally illegitimate and dangerous stereotypes condemned by the Court of Appeals in Lutheran Church and by Justice O'Connor in her dissent in Metro Broadcasting [Inc. v. FCC, 497 U.S. 547 (1990) ("Metro Broadcasting")]); Comments of Haley, Bader & Potts at 8 (program diversity "rests upon the unfounded generalization that thoughts and behavior can be categorized by race and gender.")

Some EEO opponents try to smear those favoring diversity by suggesting that we believe that viewpoints are determined by genes or skin color. To this we take offense. The wide difference of views on many issues held by women vis-a-vis men derives not from genetics but from the way women have been treated by society for generations in this country. The same is true for minorities. To illuminate the distinction we offer this parable: Suppose African seafarers had invaded Europe in the 1600s and stolen tens of millions of Europeans, carrying them to Africa to be used for free labor. Suppose that for 250 years, these Europeans were denied the right to read, vote, marry, have families, maintain contact with their children, travel or engage in commerce. Then, for 135 more years, these Europeans were subjected to state-sponsored violence and prevented from fully enjoying virtually every element of humanity and citizenship taken for granted by Africans. After this happened, would it be surprising that most of these Euro-Africans would possess a somewhat different view of the world than Black Africans?

with a different race.30/

However, it is not stereotyping to predict that minorities' presence in a broadcast station will have an impact on others who are there. Although no single person can singlehandedly represent all minorities or all women, it is not stereotyping to predict that ten minority broadcast professionals will more likely reflect the thinking prevalent in the minority community than will ten White people, or that ten women will be more aware than ten men of what issues most women consider important. It is not stereotyping to think that a broadcast station with 40 employees, ten of whom are minorities, will treat issues differently than another station with 40 employees, only one or two of whom are minorities. And it is not stereotyping to predict that listeners scanning a dial with ten stations, each of which has 40 employees, ten of whom are minorities, will more likely receive a wider range of viewpoints than would the listeners to ten other stations, each of whose staff

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30/ Some commenters confuse formats with viewpoints, and suggest that the wide range of music available to the public shows that equal employment regulation is unnecessary. See, e.g., Comments of Camrory Broadcasting at 6 ("program formats are almost always selected based on audience demographics, not employee preferences and those same demographics also affect hiring decisions, at least where on-air personalities are involved.") A program format is not a viewpoint. Certainly when minorities are trained in broadcasting, there will be more individuals with knowledge of how to create and sustain certain specialized formats aimed at minority audiences. But that is not the purpose of the proposed regulations. Commenters can be forgiven for missing this point; in dictum, the Lutheran Church court missed the distinction too. Id., 141 F.3d at 355 (suggesting that because the NAACP complained that a licensee discriminated by deeming Blacks unable to do non-music related jobs based on their musical tastes, the NAACP somehow must believe that Blacks' views on issues tend to be the same as those of Whites.)

is 40 White males.[31/] This is the underlying premise of the program diversity rationale, not that mnorities or women are genetically different than Whites or men.

Finally, it is not stereotyping to recogize that opinions and preferences are influenced by culture and proximity. Those who grew up, were educated, attend church, have relatives and perhaps themselves still live in a community are naturally more responsive to the needs of that community than those who know that community only as the view out of the window when they commute to work.

31/ The Supreme Court has addressed this stereotyping issue in the context of minority ownership, using an analysis which is based substantially on the value of minority employment as an operational tool to promote diversity. In a holding in Metro Broadcasting which was unaffected by the result in Adarand, the Court explained:

> [t]he judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete "minority viewpoint" on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled "minority programming" or that programming that might be described as "minority" does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group [emphasis supplied].

547 U.S. at 579. Also,

[n. 31 continued on p. 17]

The history of Black radio provides eloquent testimony to this principle.32/ In the 1950s and 1960s, before African Americans enjoyed a legally protected opportunity to work in broadcasting, there were a hundreds of "Black-oriented" stations. Blacks didn't own any of them. Top management was all White, with Blacks working only as underpaid announcers. Payola was commonplace. News was rip-and-read, and public affairs programs

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31/ [continued from p. 16]

> [e]vidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities. "[M]inority ownership does appear to have specific impact on the presentation of minority images in local news," inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities. In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies [emphasis supplied; footnotes citing sources omitted].

497 U.S. at 580-582. And,

> [w]hile we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves [emphasis supplied].

497 U.S. at 582.

32/ Some EEO opponents point to the existence of White-owned Black radio as proof that EEO regulations are unnecessary to ensure that minority-oriented formats are broadcast because the "marketplace" handles format selection. Certainly audience needs are a major force for format selection, although not the only one. But integration of minorities in management and ownership yields more responsive broadcast operation irrespective of how the format is chosen, as the history of Black radio well illustrates. See infra at 17-18.

typically ran during the graveyard shift or during church services. Illegal numbers tips disguised as religious "blessings" were common. Licenses were often revoked for multiple FCC rule violations.

In the mid-1970s, this began to change. As more Blacks attained the skills to become managers, Black-managed and Black-owned radio took hold and reformed the industry standard for ethics and community service. Black managers and owners simply refused to prostitute the communities they grew up in and usually lived in. Black owners and managers brought about a sea change in Black radio: within a decade, they put an end to the unprofessional, unbusinesslike, exploitative and ethically offensive practices which had been endemic to their sector of the industry for a generation.33/

Thus, EEO regulation is not based on stereotyping. Instead, by fostering interracial communication, EEO regulations could do more than perhaps any other federal rule to attack racial stereotyping.

The federal courts have largely resolved the issue of how to promote diversity in a context closely analogous to broadcast recruitment -- the selection and diversification of juries. Juries are fundamental to our democracy, as is information dissemination. The seating of a jury involves the development of a recruitment pool, venire composition, and selection -- just as the creation of a broadcast station staff involves the development of a recruitment

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33/ Much of this history is set out in depth in J. Dates and W. Barlow, eds., Split Image: African Americans in the Mass Media (1990) at 209-246.

pool, an interview pool and selection. As shown below, the Supreme Court has established a system almost exactly like the system envisioned by the NPRM for broadcasting.

First, the recruitment pool -- that is, those eligible for jury service -- must be composed in a manner which casts the net as widely as possible.[34/] Jury selection must and expressly avoid procedures likely to discourage minority participation, such as de jure discrimination[35/] or such de facto discriminatory procedures as reliance on voter rolls in a jurisdiction where there are impediments to minority voter participation.[36/] The NPRM takes the identical approach to broadcast job recruitment.[37/]

Second, the composition of venires must be undertaken in a manner designed to prevent discrimination. For example, judges are not allowed to use procedures that would tend to excuse more minorities than Whites as potential jurors.[38/] The NPRM leaves

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34/ A federal criminal jury must be "selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. §1861.

35/ Strauder v. West Virginia, 100 U.S. 303, 304 (1879) (striking state statute that limited jury service to "white male persons" as a violation of the equal protection clause.)

36/ 28 U.S.C. §1863(b)(2) (allowing venire to be selected from sources other than voter registration or voting lists "when necessary to ensure that a fair cross-section of jurors will be selected randomly without discrimination on the basis of race, color, religion, sex, national origin or economic status.")

37/ NPRM, 13 FCC Rcd at 23026-28 ¶¶61-69.

38/ A Sixth Amendment challenge to the jury selection process must meet a three-prong test: (1) the excluded persons must be from a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community; and (3) the underrepresentation is due to systematic exclusion of the group in the jury selection process.

[n. 38 continued on p. 20]

open the parallel question of broadcast job interviewing, but appears to suggest, correctly, that interviewing is the oral portion of the job application process.39/

Third, in the selection of juries themselves, discriminatory procedures, such as prosecutorial peremptory strikes on the basis of race, are prohibited.40/ However, a defendant has no right to have an integrated jury per se, only a right to procedures designed to enhance the likelihood that the jury will be a jury of her peers.41/ A court cannot consider whether an individual jury's racial composition is statistically similar to that of the community at large.42/ Again, the NPRM takes the identical

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38/ [continued from p. 19]

See U.S. v. Ireland, 62 F.3d 227, 231-232 (8th Cir. 1995) ("Ireland"). The "distinctive group" requirement has been strictly interpreted to mean African Americans (Alexander v. Louisiana, 405 U.S. 625 (1972)), Hispanics (Casteneda v. Partida, 430 U.S. 482 (1977) ("Casteneda")), Asians (U.S. v. Cannaday, 54 F.3d 544 (9th Cir. 1995)) and women (Duren v. Missouri, 439 U.S. 357 (1979)). It has not been extended to such constituencies as young people or college students; see U.S. v. Fletcher, 965 F.3d 781 (9th Cir. 1992). An equal protection challenge must meet the same three-prong test; see Castaneda, 430 U.S. at 494.

39/ NPRM, 13 FCC Rcd at 23027 ¶63; see discussion in Comments of EEO Supporters at 84-85 n. 149 and 228-230.

40/ Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991); Batson v. Kentucky, 4376 U.S. 79 (1986).

41/ See Holland v. Illinois, 493 U.S. 474 (1990) and Lockhard v. McGee, 476 U.S. 162 (1986).

42/ Ireland, 62 F.3d at 231. Thus, an equal protection challenge must show that a divergence from the cross-section requirement was pursued with discriminatory intent. For example, in Cassell v. State of Texas, 339 U.S. 282 (1950), the intent requirement was met because the jury commissioners admitted that they only called for service those citizens with whom they were acquainted personally. This behavior would be analogous to those FCC cases holding that exclusive word-of-mouth recruitment from a homogeneous workforce is inherently discriminatory; see, e.g., Walton Broadcasting Co., 78 FCC2d 857 (1980).

approach to employee selection.[43]

Fourth, the jury system is not based on a presumption that minority jurors will always vote for the minority defendant. Instead, it is based on the presumption that in the crucible of the jury room, twelve men and women, who collectively represent a wide spectrum of the defendant's peers, will bring to the jury table their life experiences and perceptions, share these experiences and perceptions with one another, and persuade one another.[44] Juries do not go into the jury room and vote immediately by secret ballot: they deliberate, often for days. Similarly, broadcast station staff members do not decide on program content in secret: they discuss it amongst themselves, often for days. And again, the NPRM takes exactly the same approach. It recognizes that the goals of preventing discrimination and promoting diversity go hand in hand.[45]

Finally, courts must maintain records to ensure that they have complied with these constitutionally based requirements.[46]

43/ NPRM, 13 FCC Rcd at 23023 ¶49.

44/ Justice Marshall articulated this principle in Peters v. Kiff, 407 U.S. 394, 503-504 (1972):

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

45/ NPRM, 13 FCC Rcd at 23016 ¶31.

46/ 28 U.S.C. §1863(d).

The NPRM proposes similar recordkeeping.47/

These goals are not based on stereotyping. Instead, they enhance the trust we place in our peers to engage in dialogue which brings us closer to truth and closer to democracy.

* * * * *

To their credit, even though the EEO opponents disagree with the premise that employment diversity promotes broadcast program diversity, no EEO opponent suggests that there is no rational basis for regulations based on this premise.48/ Since the proposed rules are race-neutral,49/ the standard of review is rational basis.50/ Not everyone agrees that employment diversity promotes program diversity, but the Commission has had thirty years of experience in this area. Drawing upon this experience, every commissioner serving from 1969 through 1997 endorsed the program diversity rationale, as did Congress on numerous occasions.51/ Empirical studies and extensive anecdotal evidence support the program diversity rationale.52/ Consequently, the proposed regulations,

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47/ NPRM, 13 FCC Rcd at 23022-23023 ¶¶47-49; 23029-30 ¶73.

48/ See Comments of Haley, Bader & Potts at 17, Delta Radio at 10-11 and SAB at 9 (urging that the proposed regulations do not address a compelling governmental interest); Comments of Evening Post Publishing at 8 and Virginia Broadcasters Association at 5 (suggesting that the proposed regulations do not address an important governmental interest.)

49/ See Comments of EEO Supporters at 55-86.

50/ See Schweiker v. Wilson, 450 U.S. 221, 230 (1981) and other cases cited in Comments of EEO Supporters at 55 n. 90.

51/ See NPRM, 13 FCC Rcd at 23014-23019 ¶¶26-38.

52/ See Comments of EEO Supporters at 134-166; id., Volume IV at 9-11 (annotating testimony of expert witnesses).

even if justified only to promote diversity,[53] easily pass the rational basis test.

B. EEO opponents have presented no cogent reason why EEO is not justified on discrimination-prevention and remedial grounds and to promote minority ownership

EEO opponents have made no serious attempt to rebut evidence that EEO regulation is justified to prevent discrimination and to remedy past discrimination.[54] Their only argument, feebly made, is that discrimination is a thing of the past.[55] They would hardly know. Broadcast trade organizations are unlikely places for discrimination victims to go seeking assistance; thus, it is not

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53/ But see Comments of LCCR (demonstrating that the proposed regulations are justified in their entirety as a program aimed at preventing discrimination.)

54/ We take this opportunity to inform the Commission of a recent decision, by a sister agency, which squarely held that intellectual property that promotes race hatred is not entitled to federal protection. A three-judge panel of the U.S. Patent and Trademark Office, applying Section 2(a) of the Lanham Act, 15 U.S.C. 1064, granted a petition to deny the renewal of the registration of the service mark "The Redskins" to Pro-Football, Inc., the owner of Washington, D.C.'s NFL franchised football team, on the ground that it "may bring Native Americans into contempt or disrepute." Harjo v. Pro-Football, Inc., Trademark Trial and Appeal Board, Paper No. 100 (Sams, Cissel and Walters, Administrative Trademark Judges, April 2, 1999) at 142. The football team is free to continue to use the offensive marks, but such use will no longer enjoy federal protection.

The FCC's role in protecting broadcasters from technical interference in their enjoyment of limited spectrum space is very closely analogous to the Patent and Trademark Office's role in protecting intellectual property holders from commercial infringement. The Redskins ruling underscores that federal protection will not be provided to discriminators. See also Bob Jones University v. U.S., 461 U.S. 574 (1983) (denying tax exemption to discriminator.) Thus, the NPRM's proposed policy of denying licenses to discriminators falls squarely within the mainstream of federal administrative law.

55/ See, e.g. Comments of TAB at 2 ("[i]n TAB's experience, and observation, there is no industry-wide discrimination problem in broadcasting.") Interestingly, TAB does not address whether former discrimination needs to be remedied.

surprising that some of the trade organizations would not be aware of (or admit to) the extent of discrimination in their industry. EEO Supporters are very aware of it because we constantly receive complaints.

The advancement of minorities and women in broadcasting over the past 30 years cannot be used as evidence that there is no discrimination.[56] Those advances came about because broadcasting enjoyed EEO regulation during that period. These results have not obtained in similar industries lacking EEO regulation, or in broadcast headquarters, which were not covered by the former EEO Rule.[57] The fact that a few minorities and women in broadcasting have crossed the bridge to equal opportunity is no reason to blow up the bridge.

The NAB, which should know better, doubted that "a link exists between employment of minorities and women and ownership opportunities."[58] However, this link has been amply documented by the testimony of minority broadcasters.[59] They are experts on the subject, and the Commission should accept the fruits of their

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56/ See, e.g., Comments of VAB at 7 ("significant increases in the employment of women and minorities belies any notion that institutional discrimination is practiced in the broadcast industry.")

57/ See Comments of EEO Supporters at 22 n. 45 and 32-33 (explaining how much the broadcast industry has progressed in comparison to print media and advertising; see also id. at 47, Table 2 (showing the difference between progress in unregulated broadcast headquarters employment compared to regulated station employment.)

58/ Comments of NAB at 18; see also Comments of Evening Post Publishing at 7.

59/ See Comments of EEO Supporters, Vol. IV, at 7-8 and 12-14 (annotating expert testimony).

experience in reaffirming its longstanding judgment that minority ownership promotes minority employment.60/

C. EEO proponents and opponents agree that the Commission should identify a goal and sunset the rule when that goal is achieved

The EEO Supporters urged the Commission to sunset the EEO regulations once the broadcast industry is fully integrated and no further federal role is needed to prevent discrimination.61/ EEO opponents do not disagree.62/ No EEO opponent urged the Commission to set an arbitrary date to sunset the regulations before their goals had been achieved. The Commission should plan to sunset its regulations when, and only when, the full representation of minorities and women has been achieved at all levels of the industry.

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60/ The need for EEO regulations to promote minority ownership is even more profound given the lack of other FCC tools to promote minority ownership. A report this week by the U.S. Small Business Administration, Office of Advocacy found that "after controlling for differences in creditworthiness and other factors, Black-owned firms were about twice as likely to be denied credit." SBA Office of Advocacy, "Minorities in Business" (April 12, 1999) at 15. This disturbing finding underscores how critical it is for government to fully utilize all other available means to enable minority businesses to compete effectively. Although the Commission can do little to influence the availability of financial capital to minority businesses engaged in broadcasting, it can do much to ensure that these businesses will enjoy meaningful availability of human capital.

61/ Comments of EEO Supporters at 39-54.

62/ See Comments of NAB at 31 ("[i]f the Commission determines that it is permissible for it to promulgate the proposed EEO rules, the Commission must tie the rule to a goal upon which, when reached, the EEO rules will sunset"); see also Comments of Haley, Bader & Potts at 18-19 and 25-26.

IV. EEO Opponents' Proposals To Weaken Enforcement Are Without Merit

A. "Voluntary" plans, featuring the absence of recordkeeping, will not be observed by most broadcasters

A "voluntary" compliance scheme is doomed to failure. Under such a scheme, the FCC's posture would be that of a highway patrol, forced by the legislature to announce to the motoring public that "the speed limit is 55, and of course we expect you to honor it. By the way, we won't be out watching." Speeders do not voluntarily obey the speed limit, and discriminators do not voluntarily provide equal opportunity.[63/]

Several EEO opponents developed "voluntary" plans which were elaborate but essentially unrealistic and unenforceable.[64/] These proposals reaffirm that industries cannot voluntarily solve an intractable problem that they created and do not understand.

The key to these "voluntary" proposals is complete unenforceability. Unenforceability would be assured by (1) the non-maintenance of records[65/] and (2) box-checking in renewal

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63/ Comments of EEO Supporters at 30-36.

64/ See, e.g., Comments of SAB at 3 ("the FCC's objective here should be to help the broadcast industry find ways to facilitate successful job searches by both station employers and prospective employees, regardless of gender, race or ethnicity, and not to impose bureaucratic paper processes that only serve to take away from the key objective of finding real jobs for real people.")

65/ See, e.g., Comments of VAB at 16 ("[a]ll broadcasters, regardless of size, should be granted an exemption from any EEO self-assessment reporting and recordkeeping requirements adopted by the Commission if they establish internship and training programs, participate in qualified job fairs, or participate in approved EEO programs"); Comments of SAB at 27 ("a station would not be required to develop information on, or keep records of, the race, ethnicity or gender of persons posting their resumes on the web pages and site of persons responding to individual job vacancies.")

applications.[66] This approach would be a serious mistake, for three reasons.

First, the absence of a recordkeeping requirement would signal to broadcasters that the Commission considers the underlying goal unimportant. Broadcasters are accustomed to maintaining and evaluating records of everything they do that is considered worthwhile. Broadcasters hardly complain that sales forecasts and ratings surveys are burdensome, because these are considered worthwhile activities. EEO is too.

Second, the elimination of recordkeeping and reporting would make discrimination undiscoverable and unremediable. The Commission's review of those records is the only means by which discrimination can be uncovered. Without records, discriminators and other EEO violators would be immunized from Bilingual investigations or hearings. It would be impossible for the Commission or the public to evaluate what the EEO program attempted to do, much less what it achieved. All discriminators would go free. As the D.C. Circuit has pointed out, "[d]iscrimination may be a subtle process which leaves little evidence in its wake."[67]

66/ See Comments of NAB at 14 (proposing that broadcasters be permitted to check various boxes certifying that they did several specific things to recruit or train minorities). The Commission is all too familiar with what happens when it lets broadcasters check boxes to certify compliance with basic regulatory requirements. See Comments of EEO Supporters at 262 n. 375 (discussing how box-checking of financial certifications by construction permit applicants was a failure.)

67/ Bilingual Bicultural Coalition on the Mass Media v. FCC, 492 F.2d 656, 659 (D.C. Cir. 1974).

Under the EEO opponents' proposals, even that "little evidence" would be unavailable.68/

68/ The proof which in the past has led the Commission to infer possible discrimination has almost always come from broadcasters' renewal applications and the records supporting them. Few other clues were ever available. Set out in the table below are the sources of the evidence which convinced the Commission or the Court that unlawful discrimination probably occurred in each of the thirteen cases in which that inference has been drawn.

Table 1

EVIDENCE LEADING TO THE INFERENCE OF DISCRIMINATION IN RENEWAL CASES

Decision Specifying EEO Issue	Source of Evidence
1. King's Garden, Inc., 34 FCC2d 937 (1972) (decided on the pleadings and never designated for hearing)	Open admission in renewal application and other pleadings filed by licensee
2. Leflore Broadcasting Co., Inc., 46 FCC2d 980 (1974)	Midterm EEO complaint by citizen group on behalf of discrimination victims; incriminating statements and omissions in early renewal application
3. Rust Communications Group, Inc., 53 FCC2d 355 (1975)	Incriminating statement in renewal application
4. New Mexico Broadcasting Co., Inc., 54 FCC2d 126 (1975)	Allegations of petitioner to deny, unrebutted by opposition to petition
5. Walton Broadcasting, Inc., 54 FCC2d 665 (Rev. Bd. 1975)	Incriminating statement by applicant in hearing on unrelated issues
6. Federal Broadcasting System, Inc., 59 FCC2d 356 (1976)	Incriminating statements in renewal application and subsequent pleadings
7. Metroplex Communications of Florida, Inc., 96 FCC2d 1090 (1984)	Discrepancy between data on Form 395 and data in renewal application, discovered by petitioner to deny

[n. 68 continued on p. 29]

68/ [continued from p. 28]

Table 1 (continued)

Decision Specifying EEO Issue	Source of Evidence
8. Albany Radio, Inc., 97 FCC2d 519 (1984)	Discrepancy between data on Form 395 and data in renewal application, discovered by informal objectors
9. Catoctin Broadcasting of New York, Inc., FCC 85-155 (released May 7, 1985)	Opposition to Petition to Deny contained apparent misrepresentations which conflicted with witness' statements
10. Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) (never designated for hearing)	Conflicting statements by licensee in responses to Bilingual letters
11. WXBM-FM, Inc., 6 FCC Rcd 4782 (1991)	Discrepancy between data in renewal application and data in response to Bilingual letter
12. Dixie Broadcasting Co., 7 FCC Rcd 5638 (1992)	Discrepancy between data in renewal application and data in response to Bilingual letter
13. Bennett Gilbert Gaines, FCC 94M-531 (released September 19, 1994)	Conflicts between good samaritan's statements in motion to enlarge and renewal applicant's opposition pleading
14. The Lutheran Church/Missouri Synod, 9 FCC Rcd 914 (1994) (vacated, 13 FCC Rcd 23328 (November 24, 1998 and Erratum, December 3, 1998)	Incriminating statements in opposition to petition to deny and in responses to Bilingual letters.

Other sources of evidence of discrimination, such as individual complaints, are seldom available, thanks to the Commission's ill-considered and outdated NBC Policy (see Comments of EEO Supporters at 324-331). It follows that if the EEO opponents' proposals are approved, the Commission will never be able to enforce the nondiscrimination section of any EEO regulations.

Third, recordkeeping serves as a gentle reminder not to discriminate.[69/] Without recordkeeping, many broadcasters who no longer discriminate would drift back into the practice again. Some who never discriminated will begin to do so for the first time. Affirmative remedial efforts simply do not happen without recordkeeping and reporting.

Yet even if a "voluntary" plan incorporated a meaningful recordkeeping requirement, the plan would still be doomed to failure. History has proven that discriminators do not voluntarily stop discriminating. The narrowly-averted 1941 March on Washington, the Montgomery Bus Boycott, and the school integration campaigns of the 1950s and 1960s were each prompted by discriminators' failure to integrate voluntarily. The Commission's original EEO Rule was adopted because broadcasters did not integrate voluntarily. Ignoring this history would set the civil rights clock back thirty years.

Human nature did not suddenly change 180 degrees in just the past few milliseconds in the long scope of history. As always,

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69/ As the Federal Glass Ceiling Commission has observed, the act of maintaining EEO records serves as a constant reminder of the duty not to discriminate. According to Jonathan S. Leonard, "[t]he historical records shows that if affirmative action programs required of federal contractors are to be effective, government monitoring and sanctions are required....In fact, the majority of the CEOs interviewed stated that law enforcement had been useful in "keeping us aware" or "keeping it on the front burner," despite the inconvenience of "more paperwork downstairs" (emphasis in original). Leonard's study, prepared for the Federal Glass Ceiling Commission, "demonstrates the weaknesses of past efforts to improve employment opportunities for minorities and women through voluntary action. When the threat of enforcement is not real, the contract compliance program ceases to have any demonstrable positive effect on minority and female employment." Jonathan S. Leonard, "Use of Enforcement Techniques in Eliminating the Glass Ceiling," Walter A. Hass School of Business, University of California, Berkeley, discussed in Glass Ceiling: The Environmental Scan, Glass Ceiling Commission (1995) at 30.

"[p]ower concedes nothing without a demand. It never did, and it never will."[70/] As the D.C. Circuit put it more than a generation ago, a voluntary desegregation program administered by a discriminating television station would be an "elect[ion] to post the Wolf to guard the Sheep in the hope that the Wolf would mend his ways because some protection was needed at once and none but the Wolf was handy."[71/] Similarly, as Department of Justice recognized after reviewing numerous studies of discrimination, "in the absence of affirmative remedial efforts, federal contracting would unquestionably reflect the continuing impact of discrimination that has persisted over an extended period."[72/]

Before the Commission ratifies the glossy proposals submitted by SAB and NAB, it should ask three simple questions.

First, have voluntary programs succeeded before? The answer is no -- not even when they're free. The industry seldom even uses the NAB's well-known and commendable Employment Clearinghouse. Of MMTC's repesentative sample of 111 radio stations who filed renewal applications in 1997, only nine reported to the Commission that they used the NAB Employment Clearninghouse.[73/] The Clearinghouse is free to NAB members, and most radio stations are NAB members. This means that the NAB can't even give away a perfectly good, meaningful voluntary initiative. It's not the NAB's fault: the

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70/ Frederick Douglass, Letter to Gerrit Smith, March 30, 1849 (in G. Seldes, The Great Quotations 214 (1978 ed.)

71/ Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1008 (D.C. Cir. 1966).

72/ Proposed Reforms to Affirmative Action in Federal Procurement, 61 FR 26042 (May 23, 1996).

73/ The study results are reported in the Comments of EEO Supporters at 216-217.

problem is endemic.[74] Predictions of a wave of voluntary activity in the absence of regulation are optimistic at best.

Second, if voluntary programs have not worked even with the incentive of regulation, why would they work now without meaningful regulation? Before the EEO Rule was adopted, the broadcasting industry had had 40 years to deliver equal opportunity voluntarily. The unregulated station brokerage business has had over 60 years to integrate voluntarily. Unfortunately, too many in this industry do no more than the minimum the Commission requires. They'll never do more unless the Commission develops a robust and effective enforcement program.

Third, why did the trade groups submit their elaborate plans in rulemaking proceedings when they could have implemented them long ago and required their members, as a condition of membership, to use the plans? These plans are not overly technical, and while many of the elements in these plans are good ones, nothing in these plans is new. Why weren't these plans instituted three years ago during the Streamlining proceeding? Why not twelve years ago when the Commission adopted its efforts-based approach to EEO regulation? Why not twenty-three years ago, when the Commission proposed to cut back on enforcement, only to be turned back by a federal court?[75] Why not thirty years ago, when the EEO Rule was first adopted? Why should the Commission now trust those who failed to act every time this issue arose before? What has stopped

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74/ See also MMTC's Tennessee Study, which found that 24% of Tennessee radio stations with 1996 renewal applications reported no sources which produced minority referrals. This finding is discussed in the Comments of EEO Supporters at 198.

75/ Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977).

these trade organizations from just implementing their proposals right now, and requiring their members to use them, and then asking the Commission to take note of what they were already doing when it decides on the appropriate scope of regulation?[76]

This is not to say that none of the NAB and SAB proposals have merit. Many of their proposals are worthwhile, such as wider industry participation in the Emma Bowen Foundation for Minority Interests in Media and greatly expanded use of job fairs (so long as these are used to supplement recruitment for each job opening).

However, other proposals NAB and SAB proposals are questionable.[77] For example, overreliance on Internet-based recruitment would infect the system of EEO recruitment with the gross racial disparities reflected in the distribution of computer access -- a condition Larry Irving has named the "digital divide.[78] Some broadcasters believe the Internet to be

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76/ Perhaps they couldn't, because apparently not all of the state associations endorse even the SAB's mostly prospective plans. See Comments of SAB at Exhibit 1, at 2 ("[w]hile BEDA encourages each State Broadcasters Association to travel along of the 'highways' identified below, it is recognized that each Association has distinct needs and resources.")

77/ We are proud to say that we consulted extensively with many EEO-positive broadcasters before developing our recommendations to the Commission. We wish the trade groups had reached out to the leading civil rights, minority and women's organizations, who possess some expertise on the subject. The trade groups' self-imposed isolation from those they say they want to help is paternalistic and speaks ill of the seriousness and sincerity of the industry proposals. Although the NAB recently hosted an informative conference on this issue, it was scheduled for March 25, well after the NAB filed its comments.

78/ See Comments of SAB at 4-5 ("[t]he web pages on the Internet will have notices of job openings at stations throughout the country...on the web pages, any person will also be able to post his or her resume, free of charge, so that stations throughout the United States will have a ready source of applicants of all races, ethnicity and gender.")

ubiquitous,[79] but Internet is hardly universally available to those most likely to use it to access the stream of employment. Current employees are unlikely to post their resumes, since their own employers will see them and realize that they desire to leave. Thus, Internet postings will be primarily useful only to entry-level personnel, such as recent high school, trade school, or college graduates -- the very persons most likely to be subject to the consequences of the digital divide.[80] Passive, computer-based schemes are at best a supplement to, but are never a substitute for, the personal touch that broadcasters do so well.

The Commission should also reject proposals that confer a benefit on broadcasters if they elect to join a private trade organization.[81]

79/ See Comments of SAB at 21 ("according to an October, 1997 survey, one in five households then used the World Wide Web in their homes, and almost as many also had access to the Web at their school or place of employment," citing "The Wirthlin Report Online: Who's Online? A Profile of U.S. Internet Users" (1998)); see also Comments of New Jersey Broadcasters Association at 4 ("[f]or those who would maintain that the use of the Internet to distribute job vacancy information unfairly leaves out job applicants in inner city, rural and poor areas, the Commission should note that the typical qualified job applicant for a broadcast station position of any race or gender will be a person who is now working in another position, attending school, or recently graduated from school, as most broadcast station positions are career positions. Persons in each of these categories frequently have access to the Internet.")

80/ See Comments of EEO Supporters at 24-29.

81/ See, e.g., Comments of SAB at 26 (urging that the Commission "should deem a station to be in compliance with that [recruitment] requirement if the station posts at least 67% of its job openings on the state broadcasters association's broadcast career Web Page and/or the BEDA Broadcast Careers Web Site and reviews the applicable resumes on the Internet Page or site and any resumes received by the station in response to the Internet posting before filing any job opening.") The Commission should avoid being entangled in evaluating and ratifying the civil rights credentials of private trade organizations which have virtually no minority or female membership.

But whatever the value of the trade organizations' proposals, they have lost their genuineness by being advanced here as a swap for an FCC promise to look the other way at discriminatory behavior. EEO compliers don't need such a deal, for they do not fear enforcement. EEO violators don't deserve such a deal, for they ought to fear enforcement. It should be below the dignity of EEO compliers to protect discriminators.

The NCTA had it right: "[a] voluntary program, while well-intentioned, is no substitute for a program enforced by the Commission."82/

There is a place for voluntary efforts, as long as they occur within the protective framework of a regulatory structure that requires broad recruitment, prohibits discrimination, and imposes strict, swift, zero tolerance consequences where these requirements are violated. Thus, the EEO Supporters again urge the Commission to create a Task Force on Equal Opportunity which could consider how these voluntary steps might be undertaken.83/

82/ Comments of NCTA at 2.

83/ It is clear from many EEO opponents' comments that such a Task Force, to be successful, should be managed by a very senior person, such as a commissioner (on the model of the 1982 Rivera Commission which expanded the minority ownership policies). The participants should include the full representation of civil rights, civil liberties, religious, labor, minority and women's organizations, broadcast educators, minority-owned broadcasters, and nonminority broadcasters who have been successful in operating their EEO programs. This group should be charged with developing a plan to implement a Commission policy of zero tolerance for discrimination, and a road map leading to full participation of minorities and women in the industry at all levels. See Comments of EEO Supporters at 333-338.

B. The Commission should emphatically reject proposals to dilute the requirement of EEO recruitment for each job opening

Recruitment for each opening is the most elementary and essential component of any meaningful EEO compliance program, and the Commission should reject all proposals that would dilute this requirement. While supplementation of an employer's internal resume file through such means as job fairs is useful, it is no substitute for determining who is available now for an opening arising now.84/

Broadcasters' haste in desiring to fill openings is understandable.85/ However, the principle of EEO recruitment is that the most qualified candidates may not be those already known to the broadcaster through word-of-mouth procedures and the old-boy network.86/ In the long run, ensuring that minorities and women have a fair opportunity to learn of job openings will result in a more competitive, more talented broadcast workforce.

Recruitment for each opening has served the industry well for thirty years. Most broadcasters have been able to honor this

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84/ See Comments of EEO Supporters at 220.

85/ See, e.g., Comments of VAB at 11 ("the adoption of rigid, specific recruitment requirements will make the recruiting and hiring process considerably longer than necessary. For example, a broadcaster may have the perfect candidate available for hire at the time a job is vacated"); see also Comments of NAB at 6 (recruitment for each openings "wastes a station's resources because, in many instances, the station needs to hire someone quickly but risks losing a qualified applicant due to the necessity of following procedure.")

86/ See Comments of EEO Supporters at 63-72.

requirement without detriment to their personnel systems.[87] Consequently, because it is at the crux of EEO and because it is not difficult to comply, the Commission must not diminish recruitment requirements. And because broadcasters so often renege on their recruiting promises, stronger enforcement is indicated.[88]

C. There are no redundancies between the FCC's and EEOC's enforcement programs

Because the FCC and EEOC subscribe to the same goals, their enforcement programs are each focused on nondiscrimination. Beyond that, no similarities exist.

87/ Two commenters ask the Commission not to penalize a regulatee that notifies a very large number of sources without scrubbing nonproductive ones. See Comments of Ameritech New Media at 6 ("if the Commission requires cable operators to contact a minimum number of minority and female oriented recruiting sources for each job opening, it should not mechanically penalize operators, like Ameritech, that notify a vast number of sources, but do not routinely substitute apparently unproductive sources"); see also Comments of NCTA at 15. Our initial comments encouraged the Commission to avoid controversies over the numerosity and composition of recruitment source lists by simply encouraging regulatees to e-mail or blastfax job notices to robust and very comprehensive source lists. Comments of EEO Supporters at 222-223. Ameritech's and NCTA's point is very well taken and we fully concur.

88/ See Comments of EEO Supporters at 215 (reporting on MMTC's study of EEO recruitment by radio stations with renewals in 1997, which found that about one-fourth of verifiable sources reported never having been contacted by the broadcaster which told the Commission it had used them for recruitment.)

An instructive example of this behavior is reported in Bennett Gilbert Gaines, 10 FCC Rcd 6589 (ALJ, 1995) ("Gaines"), which involved a radio station in Baltimore. In Gaines, which went to hearing because the renewal application was challenged by a mutually exclusive applicant, the station's EEO program listed historically Black Morgan State University as a referral source. Morgan State University enrolls 350 broadcasting majors. When the renewal application was tested in hearing, the former General Manager testified that the station had contacted the university on only three occasions -- each time by telephone. The Administrative Law Judge found that in most instances, "[no] minority specific organizations were contacted when there were job vacancies because, according to [the former General Manager] it would 'just slow things down.'" Id. at 6491 ¶21.

As explained in our initial comments, the FCC's goals include preventing discrimination before the fact, protecting the public from proven discriminators after the fact, and promoting diversity. The EEOC's only goal is protecting and making whole individual victims of discrimination after the fact. There is simply no overlap between these two distinct regulatory programs.89/ And while individual complaint processing is essential to making victims whole, it is patently insufficient to cure discrimination on an industrywide basis, as the U.S. Commission on Civil Rights told the FCC in 1969.90/

Some EEO opponents urge the Commission not to consider discrimination allegations prior to a final EEOC or court determination.91/ However, as explained in our initial comments, there are rare occasions in which the Commission must intervene right away to protect the public, including cases involving multiple stations or multiple complainants, cases shocking the

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89/ See Comments of EEO Supporters at 324-332.

90/ "It is not enough that no one comes forward to complain of its noncompliance, for that may leave discriminatory practices undisturbed, much as all other complaint-oriented procedures for enforcing State and Federal FEP requirements have had only a minor impact upon the widespread discrimination the National Advisory Commission has found still exists...complaint-oriented procedures to enforce nondiscrimination requirements, for various reasons, do not work. They cannot, in light of two decades of experience, be expected to work." Comments of the U.S. Commission on Civil Rights, reported in Nondiscrimination in Broadcasting, 18 FCC2d 240, 242 (1969).

91/ See, e.g., Comments of SAB at 30 (the Commission "should defer to the United States Equal Employment Opportunity Commission, or to the courts or state EEO agencies, for the resolution of cases relating to discrimination complaints, whether the complaints involve discrimination against an individual or allegations of a 'pattern and practice' of discrimination. This will permit the agencies with real expertise to determine whether allegations of discrimination are valid.")

conscience, and cases over which the EEOC lacks jurisdiction.[92]

V. Cable Commenters Have Made Useful Suggestions Regarding The Scope And Nature Of Recordkeeping

The EEO Supporters are pleased to endorse some of the cable industry's useful and constructive suggestions on how recordkeeping can be improved.

NCTA suggested that the Commission should "require listing the dates the vacancies were filled; dated copies of all advertisements, bulletins and letters announcing vacancies; and compilations totaling the race, ethnic origin and sex of all applicants generated by each recruiting source according to vacancy."[93] To this we add that the regulatee should provide verifiable information about the recruitment sources, including contact names and numbers,[94] and should keep records on interviewees as well.

Ameritech New Media urges the Commission to "limit recordkeeping on the race, ethnic origin, and gender of all applicants generated by each recruiting source...to applicants and employees who volunteer such information, because it is virtually impossible to employers to accurately track the race, ethnic origin and gender, let alone the source, of all job applicants."[95] Ameritech New Media correctly recognizes that the Commission can ask regulatees to permit job applicants to volunteer their race and

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92/ See Comments of EEO Supporters at 331-332.

93/ Comments of NCTA at 14; see also Comments of TCI at 15.

94/ Comments of Ameritech New Media at 7.

95/ See Comments of EEO Supporters at 213 (reporting that only 12% of valid sources listed in the 1997 renewal applications of 503 radio stations could be verified).

gender. But in addition, the Commission can ask regulatees to make good-faith visual judgments.

Finally, Ameritech New Media also asks the Commission to "clarify that electronically stored records of EEO recruitment efforts (such as copies of e-mail notices of job openings to recruitment sources) are sufficient to satisfy any record retention requirements."[96/] If the Commission endorses this simple but constructive proposal, recordkeeping costs would decline so much that today's EEO opponents may look back on this proceeding and wonder why they cut down so many trees to fight the NPRM's modest, fair, and morally decent proposals.

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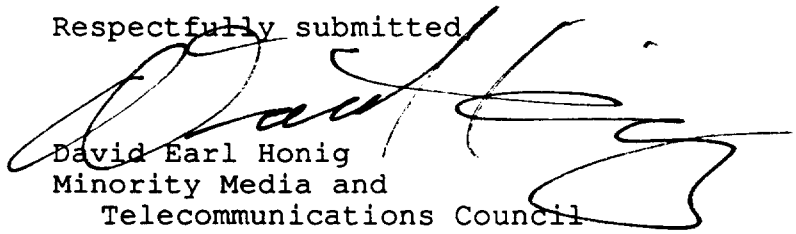
96/ Id. at 9.

Respectfully submitted,



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League of United Latin American Citizens
Mexican American Legal Defense and Education Fund, Inc.
Minority Business Enterprise Legal Defense and Education Fund
National Asian American Telecommunications Association
National Asian Pacific American Legal Consortium
National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals
National Association for the Advancement of Colored People
National Association of Black Journalists
National Bar Association
National Council of La Raza
National Hispanic Media Coalition, including its Los Angeles, New York, Chicago, Tucson, Albuquerque, Phoenix and San Antonio Chapters
National Latino Telecommunications Taskforce
National Urban League
People for the American Way
Project on Media Ownership
Puerto Rican Legal Defense and Education Fund
Rainbow/PUSH Coalition
Telecommunications Advocacy Project
Telecommunications Research and Action Center
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